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No. 94- **94-46**

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CLEMENT BERNARD,

Petitioner,

v.

CITY OF DALLAS WATER DEPARTMENT, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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46 pp

QUESTIONS PRESENTED

(1) Did the Court of Appeals err in holding, contrary to decisions of this Court and of the Fourth and Sixth Circuits, that an employer which knows of a pattern of racial harassment need not act to prevent the harassment of any particular victim until that victim has filed a complaint?

(2) Did the Court of Appeals err in holding, contrary to decisions in other circuits, that a claim of a discrimination in promotions cannot be grounded on proof of intentional racial discrimination in the training necessary to qualify for the promotion at issue?

PARTIES

The parties who participated below are the petitioner, Clement Bernard, and the respondents, the City of Dallas and the City of Dallas Water Department.

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Clement Bernard respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 7, 1994.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Texas, which is not officially reported, is set out at pp. 1a-20a of the Appendix. The opinion of the Fifth Circuit Court of Appeals, which is not published, is set out at pp. 22a-25a of the Appendix.

JURISDICTION

The decision of the Fifth Circuit was entered on April 7, 1994. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 2000e-2(a) of 42 U.S.C. states in pertinent part:

> It shall be an unlawful employment practice for an employer -
>
> (1) to ... discriminate against any individual with respect to his ... terms, conditions, or privileges of employment, because of such individual's race ....

STATEMENT OF THE CASE

This is an action under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e et seq., seeking redress for

discrimination in the terms and conditions of petitioner's employment. Petitioner is an employee at a water treatment plant operated by the respondent City of Dallas Water Department. The complaint alleged, *inter alia*, that petitioner had been the victim of racial harassment and had been denied promotions because of his race. The complaint was filed on July 31, 1990, in the United States District Court for the Northern District of Texas.

On June 23, 1[illegible], the district court granted respondents' motion for summary judgment, dismissing all of petitioner's claims with prejudice. (1a-21a). On April 7, 1994, the Fifth Circuit affirmed that dismissal. (22a-25a).

Certain facts with regard to petitioner's harassment claim are not in dispute. For several years an employee at the Water Department, one Harry B. Ketter, had engaged in systematic harassment of minorities and women in the unit where petitioner worked. Ketter was a higher ranking employee who was often assigned to work as petitioner's supervisor.[1] The harassment had begun well before petitioner was hired into that unit,[2] and prior to petitioner's arrival Ketter had directed that abuse to other employees. As the district court noted, Ketter generated and distributed

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[1] District Court Record (hereinafter "D. Ct. Rec.") 162 (affidavit of Linda Kelsey).

[2] D. Ct. Rec. 159-60 ("I can verify that the racial . . . harassment was going on long before Mr. Bernard went to work for DWU . . . Marvin Williams is a black male at [the unit involved]. [He] has been there for years before Mr. Bernard. [He] also was subjected to this type of racial harassment . . .") (affidavit of Linda Kelsey); D. Ct. Rec. 164 (graffiti all over the walls "even before Clement Bernard started working") (affidavit of Danny Holland); D. Ct. Rec. 168 (racist material displayed from 1987 onwards) (affidavit of Michael Gonzalez); D. Ct. Rec. 169 (racist displays obvious when affiant hired in mid-1987) (affidavit of Mark DuPree).

racist paraphernalia (15a), and used racial epithets. (3a, 14a) *Id.* Ketter prominently displayed a statue depicting black female genitalia, an object he had carved on government time.[3] Ketter repeatedly accosted black workers with accusations that blacks were intellectually inferior and that "the white race, like the Germans, are superior."[4] Ketter openly used the plant walls and bulletin boards to display his racist propaganda,[5] and created a display of racist paraphernalia that for months was "in full view" of anyone in the unit.[6] A number of black and female workers had resigned when it became apparent that respondent was taking no steps to end the harassment.[7] The district court concluded that Ketter's "many transgressions" were "indeed unconscionable" and "indefensible". (16a-18a). The Court of Appeals held that petitioner had adduced "sufficient evidence of a racially hostile working environment," including Ketter's "racially insulting conduct and display ... [of] materials derogatory of blacks in the workplace." (24a).

In response to the motion for summary judgment, petitioner also submitted several undisputed affidavits demonstrating that the plant managers were understandably aware of Ketter's harassing activities before petitioner was victimized. A prior black worker had been harassed by Ketter "with management's knowledge."[8] Victims of harassment were instructed on several occasions that they

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[3] D. Ct. Rec. 161 (affidavit of Linda Kelsey).

[4] D. Ct. Rec. 166 (affidavit of Danny Holland).

[5] *Id.*; D. Ct. Rec. 168 (affidavit of Michael Gonzalez).

[6] D. Ct. Rec. (affidavit of Mark DuPree).

[7] D. Ct. Rec. 163 (affidavit of Linda Kelsey).

[8] D. Ct. Rec. 160 (affidavit of Linda Kelsey).

would have to "ignore" the abusive remarks.[9] The offensive statue was displayed where management officials regularly saw it, and had been created by Ketter out of city materials "with the knowledge of management."[10] Ketter's more elaborate display of racist paraphernalia was in a room regularly visited by managers and supervisors.[11] The Court of Appeals correctly observed that although "[t]his activity apparently went on for some time, ... management did not take action to stop it until ... October, 1988". (24a).

The Court of Appeals nonetheless concluded that on this record summary judgment should be granted to the respondent employer. The Fifth Circuit held that under Title VII the employer's only obligation to petitioner was to take action if and when petitioner complained about Ketter. Petitioner filed such a complaint in October, 1988, objecting that he, like other employees at the plant, had been repeatedly harassed by Ketter. After Ketter had "persisted in his disruptive and antagonistic behavior" (15a) for three additional months, respondent finally reassigned him to an area of the plant where he would have less contact with petitioner. The Fifth Circuit reasoned that respondents' knowing inaction prior to October 1988 was legally irrelevant, and that the legal inquiry was limited to whether the city had responded adequately once Bernard formally complained. Finding the city's actions after October 1988 sufficient, the court of appeals concluded that summary judgment in favor of respondent was required on the racial harassment claim.

Petitioner's promotion claim concerned his unsuccessful efforts to promote to the position of T-9

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[9] *Id.*

[10] D. Ct. Rec. 161 (affidavit of Linda Kelsey).

[11] D. Ct. Rec. 170 (affidavit of Mark DuPree).

Instrument Technician. Petitioner had been hired as a T-7 Apprentice Instrument Technician (1a). Petitioner alleged that because of his race he was denied the training needed to promote to Instrument Technician.[12] As a journeyman Instrument Technician, Harry Ketter was responsible for providing that training. In addition to the evidence of racial harassment by Ketter described *supra*, petitioner adduced direct evidence of a discriminatory motive behind the denial of training. In response to the summary judgment motion, petitioner submitted an affidavit describing remarks by Ketter and by petitioner's regular supervisor, Don Pierce:

> It was ... Harry Ketter[']s place to train T-7's for promotions. [He] made the comment on several occasions as long as he was there no black man Mr. Bernard or [another black worker] would become [a] T-9 or higher. Don Pierce the T-10 had the same opinion. He also said that on several occasions.[13]

Having been denied the necessary training, petitioner was unable to pass the civil service examination for promotion to Instrument Technician. After repeatedly failing in his attempts to promote to the position of Instrument

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[12] 2a, 10a. The complaint alleged, *inter alia*:

> "Plaintiff ... was required ... to be trained by one of Defendant's employees, Harry Ketter. Defendant's agent Ketter flatly refused to train Plaintiff because of Plaintiff's race, black, and Plaintiff reported this to ... [the] Assistant Manager of the Plant"

Par. 5.

[13] D. Ct. Rec. 162 (affidavit of Linda Kelsey).

Technician, petitioner ultimately found another worker who would train him to work as a Mechanic Technician, and he succeeded in promoting into that position. (13a).

Both courts below held that any such discrimination in training was legally irrelevant. They reasoned that the proper inquiry under Title VII was limited to whether there was discrimination in the promotion decisions themselves. Ketter's racial animus was irrelevant, they insisted, because Ketter himself did not make the actual promotion decisions.[14] The court of appeals concluded that summary judgement was mandated by the fact that petitioner "did not pass the required test for promotion." (23a).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OF THE FOURTH AND SIXTH CIRCUITS REGARDING THE OBLIGATION OF AN EMPLOYER TO STOP KNOWN INVIDIOUS HARASSMENT

The decision below reopens a loophole in the nation's anti-discrimination laws which this Court intended to close eight years ago. In *Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1986), this Court unanimously rejected the argument that an employer had no obligation to stop the sexual (or racial) harassment of an employee until and unless that employee lodged a complaint objecting to such discrimination.

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[14] 2a ("At no time during plaintiff's employment ... did Harry Ketter have the power to ... promote ... the plaintiff[f]."), 23a ("Harry Ketter ... could not directly influence this decision").

> [W]e reject [the employer's] view that the mere existence of a grievance procedure ... coupled with [the employee's] failure to invoke that procedure, must insulate [the employer] from liability.

477 U.S. at 72. In *Meritor* the employer expressly conceded that it would have been liable if it "knew [or] reasonably could have known of the alleged misconduct." 477 U.S. at 70. This Court observed that an employer would of course be in violation of Title VII if the acts of harassment were "so pervasive and so long continuing ... that the employer must have become conscious of [them]." 477 U.S. at 72.

The Fifth Circuit decision in the instant case endorses an interpretation of Title VII expressly rejected by this Court and disavowed by the employer in *Meritor*. Under the decision below, even actual knowledge by the employer that racial harassment is occurring imposes no obligation on the employer to act unless, and until, each particular victim complains. On the Fifth Circuit's view, an employer has no general duty to end known racial harassment, or to protect employees whom it has reason to know will be or are being harassed. Only when and if one of those known victims chooses to complain does Title VII impose any responsibility, the circuit court concluded, and that responsibility is limited to assisting to that particular victim. A failure to respond to such a complaint does not expose the employer to lability to any other victim of the known harassment.

In this case the court of appeals acknowledged there was sufficient, largely undisputed evidence to establish that the harassment had created "a racially hostile working environment." (24a-25a). The Fifth Circuit also acknowledged that racial harassment at the facility was a

longstanding problem, which the employer did nothing about until October, 1988:

> The activity apparently went on for some time, but management did not take action to stop it until Bernard complained in October, 1988. At that time, management began regularly to enforce its policy of preventing displays of offensive material.

(24a) (Emphases added). The undisputed evidence made clear that management had known about the harassment long before October 1988. (See pp. 4-5, supra).

Under these circumstances, *Meritor* clearly dictated a finding of employer liability. The Fifth Circuit reached precisely the opposite result, holding that liability to Bernard was to be determined, not based on the years of knowing inaction by respondents prior to October 1988, but solely by how the city had responded after petitioner Bernard complained:

> [T]he circumstances demonstrate that the managers ... took prompt action when informed that Bernard found Ketter's conduct offensive ...

(25a) (Emphasis added). Although plant managers had earlier failed to act on misconduct known to all, and thus clearly signaled that the misconduct was acceptable, the Fifth Circuit thought it sufficient to defeat this action that "[m]anagement's handling of this situation after Bernard complained never suggested that Ketter's offensive conduct was tolerated or excusable." (25a) (Emphasis added). Although city officials had cavalierly instructed previous harassment victims that they would have to try to ignore Ketter's harassment, that deliberate inaction, the Fifth Circuit held, was irrelevant because management did not

"advise Bernard to ignore Ketter's behavior." (25a) (Emphasis added.)

The Fourth and Sixth Circuits have expressly rejected the Fifth Circuit rule in this case, holding instead that once an employer learns of ongoing harassment it must act to protect all employees, not merely those, if any, who have complained. In *Yates v. Avco Corp.*, 819 F. 2d 630 (6th Cir. 1987), the company sought to avoid liability to the plaintiffs at issue by insisting it "took remedial action once the plaintiffs registered complaints." 819 F.2d at 636. The Sixth Circuit rejected that argument, noting that the employer "had notice" of the problem years earlier. 819 F.2d at 835). Under "agency principles", the Sixth Circuit reasoned, the employer was liable to the plaintiffs and any other subsequent victims because their injuries were "foreseeable." 819 F.2d at 636.

> [The employer's] duty to remedy the problem, or at a minimum, inquire, was created earlier when the initial allegations of harassment were reported.

Id.

Similarly, in *Paroline v Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989) *modified on other grounds* 900 F.2d 27 (4th Cir. 1990), the Fourth Circuit reversed a district court decision which had granted summary judgment "because Unisys took prompt remedial action after Paroline's complaint." 879 F.2d at 102 (Emphasis added). The Fourth Circuit rejected the employer's argument that it was entitled to summary judgement if it merely proved that it "took prompt and adequate remedial steps once Paroline complained." 879 F.2d at 106 (Emphasis added). The Fourth Circuit noted that there had been prior complaints by other employees about sexual harassment by the same individual who ultimately victimized the plaintiff, and that there was evidence suggesting that Unisys had earlier taken

only nominal measures in response to the known harassment. 879 F.2d at 106-07. The Fourth Circuit held:

> In a hostile environment case under Title VII, we will impute liability to an employer who anticipated or reasonably should have anticipated that the plaintiff would become a victim of sexual harassment in the work-place and yet failed to take action reasonably calculated to prevent such harassment. An employer's knowledge that a male worker has previously harassed female employees other than the plaintiff will often prove highly relevant in deciding whether the employer should have anticipated that the plaintiff too would become a victim of the male employee's harassing conduct.

879 F.2d at 107 (Emphasis in original). The Fifth Circuit's decision in the instant case applies precisely the opposite rule.[15]

The Fifth Circuit decision in this case has the effect of virtually suspending in Texas, Louisiana and Mississippi the Title VII prohibition against sexual and racial harassment. Employers in those states no longer need prevent foreseeable acts of harassment or deal with known harassers. Faced with a substantiated complaint of racial or sexual harassment, employers in the Fifth Circuit are under no legal obligation to end the misconduct or discipline the wrongdoer, but are required only to protect the specific complainant. An employer may now meet its statutory obligations in the Fifth Circuit merely by separating the

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[15] The reasoning of the courts below that the respondents' conduct did not violate Title VII is not affected by the changes in Title VII remedies under the 1991 Civil Rights Act.

complainant and the wrongdoer, even though the harasser remains free to redirect his abuse at other employees.

That is precisely what occurred in the instant case. Both courts below concluded that respondents had met their obligations under Title VII simply by relocating Ketter, an employee whose record of racial and sexual harassment was well known, to another part of the plant;

> [After] Ketter proved unwilling to conform his behavior to the standards of the workplace ... he [was] transferred out of plaintiff's work area. While Ketter's behavior in the workplace is indefensible, there is nothing inherently unlawful or inequitable about the ... treatment accorded Ketter by his supervisors.....

(17a).[16] On this view, Title VII imposes on employers, not an obligation to prevent sexual or racial harassment, but only a duty to periodically provide the harasser with a fresh set of victims. Under the decision of the courts below, respondents could tomorrow knowingly and deliberately designate as petitioner's supervisor an avowed bigot with a persistent history of racial harassment, so long as they chose a racist other than Harry Ketter.

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[16]See also 15a (employer concedes Ketter remained "uncontrite and persisted in his disruptive and antagonistic behavior")

II THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS THAT A PROMOTION CLAIM CAN BE BASED ON THE DISCRIMINATORY DENIAL OF THE TRAINING REQUIRED FOR PROMOTION.

The second question presented by the decision below is whether the Title VII prohibition against discrimination in promotions can be evaded by the simple expedient of denying black workers the training needed to qualify for promotion.

The circumstances of this case present a classic case of such a scheme to circumvent Title VII. Petitioner offered uncontradicted evidence that Ketter was responsible for providing to T-7 Apprentice Instrument Technicians the training required to promote to T-9 Instrument Technician. (See p. 6, *supra*). Both courts below recognized that Ketter had a long history of racial harassment of black workers. Petitioner also adduced direct evidence of statements by Ketter, and by petitioner's regular supervisor, that they were determined to prevent any black worker from promoting into a T-9 position. Petitioner's allegation that he was in fact denied needed training was also uncontradicted.

Both courts below dismissed this evidence as legally irrelevant. Candidly recognizing Ketter's racial animus, the lower courts regarded as irrelevant Ketter's training responsibilities, insisting his racism was unimportant so long as Ketter himself did not make the actual promotion decisions. (2a, 23a). The dispositive fact, the Fifth Circuit insisted, was that Bernard "did not pass the required test for promotion." (23a). To the Court of Appeals it was of no legal significance that petitioner alleged he was unable to pass that test precisely because Ketter refused to give him the needed training.

The three other circuits to address this issue have all held, contrary to the decision of the Fifth Circuit in this case, that Title VII prohibits an adverse employment action that is grounded on a discriminatory denial of training. In *Wright v National Archives & Records Service*, 609 F.2d 702 (4th Cir. 1979) (en banc), the plaintiff claimed that he had been unlawfully denied the training necessary for promotion from a GS-5 position to a GS-9 position. Although the en banc court was divided as to whether the plaintiff had proven intentional racial discrimination in training, all members of the Fourth Circuit agreed that such proof would have entitled the plaintiff to relief for the ensuing promotion denial.

In *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194 (1st Cir. 1987), the plaintiff alleged that he had been unfairly denied pay raises because his job performance was adversely affected by the discriminatory denial of job training accorded to whites. 832 F.2d at 196-97. There, as alleged here, the individual responsible for providing the relevant training flatly refused to do so. The First Circuit upheld a finding of liability based in part on that discrimination. 832 F.2d at 201-02:

> The district court found that Anheuser-Busch had discriminated against Rowlett on the basis of race in the pay raises he received. He established ... that he received smaller raises than the white foremen received. Anheuser-Busch explained this ... as resulting from Rowlett's evaluations. The district court found this reason to be ... intricately related to the denial of training. Rowlett had been criticized for his lack of skills .... Yet the court found that the lack of skills were

> directly related to the discriminatorily denied training .... We find this reasoning persuasive ....

832 F.2d at 202.

Finally, in *Long v. Ford Motor Company*, 496 F.2d 500 (6th Cir. 1974), the plaintiff, who had been dismissed for allegedly inadequate job performance, claimed that any such deficiencies were due to inadequate training by the employer. 496 F.2d at 502. The Sixth Circuit held that the plaintiff would be entitled to prevail if he could demonstrate that the denial of training was the result of intentional discrimination on the basis of race. 496 F2d at 505.

As a result of the decision below, the scope of the protections afforded by Title VII now vary according to the location of the employer. An employer in the Fifth Circuit can legally discriminate in promotions -- and, presumably in wages or discharges -- by intentionally denying needed training to minorities or women. In the First, Fourth and Sixth Circuits, on the other hand, such a scheme of intentional discrimination is a per se violation of federal law.

CONCLUSION

For the above reasons, a writ of certiorari should be granted to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF YTEXAS
DALLAS DIVISION

CLEMENT BERNARD,

Plaintiff,

vs.

CITY OF DALLAS, CITY OF DALLAS WATER DEPARTMENT
(Dallas Water Utilities),

Defendants.

MEMORANDUM OPINION AND ORDER

Now before the Court is Defendant's Motion For Summary Judgment, filed on February 6, 1992. Plaintiff's Response was filed on March 11, 1992.

I. *UNDISPUTED FACTS*

1. Plaintiff is a black male who began work on March 12, 1986 as an Apprentice Water Instrument Technician T-7 at the Southside Wastewater Treatment Plant's Instrument Section ("SSWWTP") for the Dallas Water Utilities ("DWU").

2. On July 31, 1990, Plaintiff filed this lawsuit against Defendants City of Dallas and DWU alleging racial discrimination in training, racial harassment and retaliation under 42 U.S.C., §2000(e).

3. Harry B. Ketter was also an employee of DWU. He was a Water Instrumentation Technician T-9. At no time during Plaintiff's employment with DWU did Harry Ketter have the power to fire, promote or otherwise directly affect the plaintiff's employment

4. Plaintiff alleged racial discrimination and/or intimidation on January 23, 1989 in his first EEOC complaint (#310-89-0858), two years after he began working at SSWWTP. The EEOC determination on these charges found that there was no evidence that Plaintiff was denied proper training because of his race. The EEOC cause determination also concluded that the City of Dallas took remedial action once made aware of harassment by a fellow employee, and that no additional relief was necessary.

5. In October, 1988, Plaintiff verbally complained

to Ted Kilpatrick, Southside Wastewater Treatment Plant (SSWWTP) Manager. The verbal complaint involved ongoing disagreements Plaintiff had with fellow employee Harry Ketter who had made derogatory statements concerning Plaintiff's race (black). Plaintiff further alleged Ketter had posted derogatory drawings and pictures on the walls of the Instrument Section work area. Ted Kilpatrick directed Don Perez, SSWWTP Assistant Manager, to investigate the incidents, and to monitor the employees of the Instrument Section for inappropriate activities. Approximately one week later, Don Perez reported to Kilpatrick that he had counseled with the parties, and each party was committed to going forward and working harmoniously. As plant manager, Kilpatrick also had a policy of maintaining the work place free of inappropriate literature. The investigation did find some pictures of a sexual and religious connotation and Mr. Kilpatrick ordered that they be removed immediately. On December 14, 1988, Kilpatrick met with Plaintiff to determine the status of the

grievance. According to the Plaintiff, the concerns expressed in the complaints were resolved.

6. On or about December 22, 1988, Ted Kilpatrick held a counseling session with Plaintiff, Ketter and Don Pierce, who then was the supervisor of Plaintiff and Ketter. Kilpatrick again discussed his policy of maintaining the work place free of inappropriate literature and the responsibility of each employee to work cooperatively. Plaintiff and Ketter both pledged that they would work cooperatively in the work place. Also, on December 22, 1988, Ted Kilpatrick conducted a separate counseling session with Don Pierce concerning his responsibilities in overseeing the Instrumentation Group. Ted Kilpatrick directed Don Pierce to monitor the employees and document any misconduct.

7. On December 28, 1988, Plaintiff again verbally complained with Ted Kilpatrick. Plaintiff alleged that the incidents of harassment by Harry Ketter were continuing. In response Ted Kilpatrick directed another investigation. On

or about January 9, 1989, Kilpatrick ordered that the Instrument Section be reorganized and that the parties having conflicts in the work place be assigned to different areas of the plant, and not to work together. Kilpatrick also ordered that Harry Ketter not be left in charge as acting supervisor should the supervisor Don Pierce not be on duty. Plaintiff did not appeal Kilpatrick's actions to his complaint.

8. Inspections for inappropriate literature and materials were continually conducted until September, 1989 by Kilpatrick, Don Perez/SSWWTP Assistant Manager, Jesse Beard/SSWWTP Maintenance Supervisor and Kathryn Hedges/Dallas Water Utilities Personnel Representative.

9. Plaintiff alleged retaliation in violation of Title VII in his second EEOC complaint filed April 13, 1990. Plaintiff asserted that the retaliation occurred when he was denied a merit increase as a result of his yearly performance evaluation. The performance evaluation was received from Plaintiff's direct supervisor, Don Pierce, a white male. Don Pierce notified Plaintiff the year earlier that his performance

would have to improve to get the Top Step merit increase. Don Pierce gave Plaintiff a satisfactory performance rating, however, he had also recommended that Plaintiff needed to perform at a higher rate in order to qualify for the top merit increase. Don Pierce did not deny the increase, but recommended another evaluation in six months.

As a standard procedure, all performance evaluations and recommendations of merit increases are reviewed by the section's division manager, which in this case was Ted Kilpatrick, also a white male. After discussing with Plaintiff his concerns regarding his annual evaluation and merit increase recommendation, Division Manager Kilpatrick met with Plaintiff's immediate supervisor Don Pierce. In this meeting with Kilpatrick, Pierce reviewed his evaluation process and his recommendation that Plaintiff needed to be performing at a higher level to qualify for his top merit increase. Thereafter, as is standard practice for all employees, Kilpatrick reviewed Plaintiff's merit recommendation and the information provided by Plaintiff

and Pierce. Subsequently, Kilpatrick recommended that Plaintiff receive his merit raise.

10. Dallas Water Utilities Management had a policy of maintaining all work areas free of inappropriate literature. On or about December 9, 1988, Mr. Ted Kilpatrick/SSWWTP Plant Manager discovered several playboy-type magazines in Ketter's desk area. Kilpatrick confiscated those magazines and verbally reprimanded Ketter for having inappropriate material in the work place. When questioned about the magazines, Ketter acknowledged he had read the magazines, but denied ownership. Ketter received a written reprimand for insubordination on March 22, 1989.

11. After counseling sessions proved unsuccessful, Kilpatrick ordered the permanent transfer of Ketter from the Instrumentation Section in September, 1990.

12. On or about May 11, 1990, the EEOC issued a Right to Sue letter based on a second EEOC charge, No. 310890858, filed against the City of Dallas Water

Department by Plaintiff.

13. Plaintiff filed suit based on the Right to Sue Letter on July 31, 1990.

II. *SUMMARY JUDGMENT REQUIREMENTS*

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment or partial judgment as a matter of law. *See* Fed. R. Civ. P. 56. As the Fifth Circuit stated in *Christophersen v. Allied-Signal Corp.*, 902 F.2d 362, 364 (5th Cir. 1990), "[b]efore a court may grant summary judgment, the moving party must demonstrate that it is entitled to judgment as a matter of law because there is no actual dispute as to an essential element of the plaintiff's case."

Where the nonmovant bears the burden of proof at trial, the movant may discharge its burden by showing, that is, by pointing out to the court, that there is an absence of evidence to support the nonmovant's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Where the nonmovant

bears the burden of proof at trial, the movant is not required to produce evidence to negate the opponent's claims. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 110 S.Ct. 3177, 3187, 111 L.Ed.2d 695 (1990). For that reason, there is no burden on the movant to support its motion with affidavits or other similar materials where the nonmovant will bear the burden of proof at trial. *Celotex*, 477 U.S. at 323. Rather, the movant need only demonstrate that the evidence which does exist does not "present a sufficient disagreement to require submission to a jury...." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-252, 106 S.Ct. 2505, 91 Led. 2d 202, 214 (1986).

Federal Rule of Civil Procedure 56(e) prescribes what form the non-movant's response must take in order to defeat a properly pled and supported motion for summary judgment or partial summary judgment:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that

there is a genuine issue for trial. If the adverse part does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. Fed.R.Civ.P. 56(e).

III. *PLAINTIFF'S CAUSES OF ACTION*

Plaintiff alleges three basic causes of action in his complaint against Defendant:

(1). Plaintiff claims he was discriminated against and discharged in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* in retaliation for his filing of the initial EEOC charge.

(2). Plaintiff claims that he suffered racial harassment in the workplace while employed by Defendant, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*

(3) Plaintiff claims racial discrimination against him by Defendant in job training and promotions in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*

(3). Plaintiff seeks the following:

A. A declaratory judgment that the practices

alleged in Plaintiff's Original Complaint are in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*

B. An injunction prohibiting Defendant from engaging in the aforesaid practices.

C. An injunction prohibiting Defendant from engaging in racial discrimination.

D. An injunction prohibiting Defendant from engaging in retaliation for the exercise of protected rights.

E. Damages in the form of wages and other benefits he would have received but for Defendant's discrimination, including promotion to a position that he is qualified to hold, and in a department where he will not have to work with or be supervised by those individuals who have discriminated against Plaintiff, and pre-judgment and post-judgment interest.

F. An award to Plaintiff of costs and attorneys' fees

IV. *DEFENDANT'S MOTION FOR SUMMARY JUDGMENT*

A *DISPARATE TREATMENT THEORY ARGUMENTS*

Defendant asserts that Plaintiff cannot recover under a disparate treatment theory because Plaintiff cannot meet the burden of proof for such cases established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In *McDonnell, Id.*, the Supreme Court required that a plaintiff can recover against an employer under a disparate treatment theory only by making a prima facie showing that (1) he is a member of a protected group; (2) he is qualified for the job to which he sought promotion; (3) he was denied promotion; and, (4) after his denial of a promotion, others who are not members of the protected class were promoted into those positions.

If a *prima facie* case is made by a plaintiff, then under *McDonnell* the employer must articulate a legitimate nondiscriminatory reason for its action.

If a legitimate nondiscriminatory reason is articulated by the employer, then *McDonnell* requires the plaintiff to show by a preponderance of the evidence that the employer's reason is merely pretextual.

Defendant argues that Plaintiff has not made a *prima facie* case of disparate treatment. Defendant contends that Plaintiff had every opportunity to train for and compete for promotions within his department, that in fact he passed the T-9 Mechanic Technician Test with the help of a white supervisor, after failing the examination several times. Plaintiff has not shown, Defendant argues, where similarly situated white employees were provided training to qualify for promotions, while black employees like himself were not.

B. *HOSTILE WORK ENVIRONMENT ARGUMENTS*

Defendant argues that Plaintiff also cannot prevail under a Title VII hostile work environment action because to do so requires that Plaintiff must prove that the work environment is "so heavily polluted with discrimination as to

destroy completely the emotional and psychological stability of minority group workers...." *Rogers v. Equal Employment Opportunity Commission*, 454 F.2d 234 (5th Cir. 1971).

First, Defendant contends that the primary contributor to work pollution in Plaintiff's work environment, Harry Ketter, was in no position to affect adversely Plaintiff because Ketter was not Plaintiff's supervisor.

Second, Defendant argues that Plaintiff and Ketter voluntarily engaged in acrimonious conversations with each other about various racial, religious, and sexual issues.

Third, Ketter's use of racial epithets alone do not rise to the level of work environment pollution that would violate Title VII.

Fourth, the behavior of Ketter was not the norm in the workplace.

And his activities were not condoned by his supervisors. And, fifth, the racist paraphernalia generated and distributed by Ketter was limited and not pervasive in

the work environment.

Defendant also argues that management at the Dallas Water Department took an active role in curtaining the activities of Ketter, and eventually transferred him out of Plaintiff's work area when he proved uncontrite and persisted in his disruptive and antagonistic behavior.

C. *RETALIATION THEORY ARGUMENTS*

Defendant argues that Plaintiff cannot prevail under his retaliatory action theory under 42 U.S.C. §2000(e) because he cannot meet the burden of proof to maintain such an action: (1) that he was engaged in a protected activity; (2) that an adverse employment action occurred; and (3) that there is a causal connection between the protected activity and the adverse employment decision. *Jones v. Flagship Internat'l*, 793 F.2d at 714, 724 (5th Cir. 1986).

Defendant contends that Plaintiff fails the second prong of the test because he has not established that his performance evaluations and timely merit increase in salary

on March 12, 1990 constitute an adverse employment action.

V. *PLAINTIFF'S RESPONSE*

Plaintiff's Response to Defendant's Summary Judgment Motion consists of four affidavits, all of which are from fellow co-workers who discussed their recollection of the many transgressions in the work place of Harry Ketter.

VI. *DISCUSSION*

The Court finds persuasive Defendant's arguments refuting Plaintiff's disparate treatment claim. Plaintiff has not established a *prima facie* case of disparate treatment with respect to promotions. A summary judgment ruling in favor of Defendant on the disparate treatment claim is justified.

The Court finds persuasive Defendant's arguments refuting Plaintiff's hostile work environment theory. Harry Ketter's behavior in the workplace, gleaned from affidavits, depositions and exhibits submitted by Plaintiff and Defendant, was indeed unconscionable. But the Court finds that Plaintiff has not met the standard for a hostile work

environment set forth in *Rogers, supra*. While in retrospect it may appear that Ketter's supervisors should have taken decisive action against Ketter in a more expeditious manner, they cannot be faulted for taking the course they followed. Ketter was afforded every opportunity to improve his behavior. After Plaintiff advised Ketter's supervisors of Ketter's disruptive and antagonistic activities, they began to monitor Ketter's activities and warned or reprimanded Ketter when he transgressed. It was only after Ketter proved unwilling to conform his behavior to the standards of the workplace was he transferred out of Plaintiff's work area. While Ketter's behavior in the workplace is indefensible, there is nothing inherently unlawful or inequitable about the even handed and judicious treatment accorded Ketter by his supervisors at DWU.

Furthermore, the very fact that Ketter was indiscriminate in his antagonistic remarks and activities mitigates against a finding that there exists a hostile work environment within the meaning of *Rogers*. Ketter did not

focus exclusively on Plaintiff. Rather, as the affidavits Plaintiff cites in his Response attest, Ketter harassed all his section co-workers equally. See *Vaughn v. Pool Offshore Co., Etc.*, 683 F.2d 922 (1982).

The Court finds persuasive Defendant's argument countering Plaintiff's retaliation theory claims. Plaintiff does indeed fail to meet the second prong of the three prong test set forth in *Jones, Id.* He has not shown that an adverse employment action occurred as a result of his engaging in a protected activity, to wit: filing a complaint with the EEOC. Consequently, Plaintiff also fails to meet the third prong of the *Jones* test. A Summary judgment ruling in favor of Defendant on Plaintiff's retaliation theory is therefore justified.

C. *RULING*

Having considered the law and the evidence, the Court GRANTS Defendant's Motion For Summary Judgment in all respects.

SO ORDERED.

Signed this 23rd day of June, 1993

S/S

JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

3:90-CV-1783-P

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF YTEXAS
DALLAS DIVISION
Filed July 23

CLEMENT BERNARD,

Plaintiff,

vs.

CITY OF DALLAS, CITY OF DALLAS WATER DEPARTMENT
(Dallas Water Utilities),

Defendants.

FINAL JUDGMENT

By Memorandum Opinion and Order of this date, the Court has granted Defendants' Motion for Summary Judgment.

It is ORDERED AND ADJUDGED that Plaintiff, CLEMENT BERNARD, take nothing, and that the action be dismissed with prejudice.

It is further ORDERED AND ADJUDGED that all

relief not specifically granted herein is denied.

Signed this 23rd day of June, 1993

S/S

JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

Filed Apr. 07, 1994

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1651
Summary Calenndar

CLEMENT BERNARD,

Plaintiff-Appellants,

vs.

CITY OF DALLAS AND CITY OF DALLAS WATER DEPARTMENT
(Dallas Water Utilities),

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Texas
3:90-CV-1783-P

Before DAVIS, JONES, and DUHE, Circuit Judges.*

PER CURIAM:

---

* "Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

On appeal from the trial court's grant of summary judgment against his claim of racial discrimination in employment, appellant Bernard raises two issues. He contends there were genuine issues of material fact regarding whether the City of Dallas water department in which he works was charged by a racially hostile environment and whether he was denied a promotion because of discrimination.

Although our analysis differs somewhat from that of the district court, we affirm the grant of summary judgment.

1. *The promotion claim.*

Bernard asserts that he was discriminated against in his attempts to be promoted to the rank of T-9 Instrument Technician, but he did not present sufficient admissible evidence that this was based on racial animus. Harry Ketter, a coworker, could not directly influence this decision. Further, Bernard did not pass the required test for promotion. He was, however, promoted to T-9 Mechanic Technician. He did not bring forth enough evidence to

create a genuine fact issue concerning this claim.

2. *The hostile environment claim.*

We disagree with the district court's conclusion that Bernard did not produce sufficient evidence of a racially hostile working environment. His coworker Ketter, who substituted as supervisor occasionally, engaged in racially insulting conduct and displayed materials derogatory of blacks (and religion) in the workplace. This activity apparently went on for some time, but management did not take action to stop it until Bernard complained in October, 1988. At that time, management began regularly to enforce its policy of preventing displays of offensive material. Management also counseled regularly with Bernard and Ketter in order to stem Ketter's offensive conduct and insure that everyone could work together. In January, 1989 Ketter was transferred to another part of the plant where he would not encounter Bernard. Later, Ketter was permanently transferred.

While the circumstances, including Bernard's

summary judgment affidavits of coworkers, suggest that a racially hostile working environment may have existed, they also demonstrate that the managers of the water plant took prompt remedial action when informed that Bernard found Ketter's conduct offensive. Within three months of Bernard's first complaint, Ketter was transferred to another part of the plant. During that interval, management counseled Ketter on several occasions to shape up.

Management's handling of this situation after Bernard complained never suggested that Ketter's offensive conduct was tolerated or excusable, nor did management ever advise Bernard to ignore Ketter's behavior. Bernard's summary judgment evidence did not contest the facts concerning the city's handling of Ketter's misbehavior. The city's uncontroverted actions constituted a prompt remedial response to Bernard's complaints.

Because there was no genuine issue of material fact raised in the foregoing particulars, the district court's judgment is AFFIRMED.

Supreme Court, U.S.
FILED
AUG 9 1994
OFFICE OF THE CLERK

No. 94-46

In The

Supreme Court of the United States

October Term, 1994

CLEMENT BERNARD,

Petitioner,

vs.

CITY OF DALLAS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court grant a writ of certiorari where the Fifth Circuit Court of Appeals has correctly applied this Court's standards on whether an individual has suffered actionable racial harassment and whether the Respondent took immediate and corrective action?

2. Should this Court grant a writ of certiorari where the Fifth Circuit Court of Appeals has correctly applied this Court's standard on whether an individual has suffered racial discrimination in promotions?

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No. 94-46

In The

Supreme Court of the United States

October Term, 1994

CLEMENT BERNARD,

Petitioner,

vs.

CITY OF DALLAS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE UNITED STATES SUPREME COURT:

The City of Dallas ("City") files this Brief in Opposition to this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit ("Response"), asking this Court to deny the Petition for Writ of Certiorari ("Petition") to review the opinion issued on April 7, 1994, by the United States Court of Appeals for the Fifth Circuit. In support of this request, the City respectfully shows the Court as follows:

JURISDICTION

The Court's jurisdiction of this appeal is based on the judgment and opinion of the Fifth Circuit Court of Appeals entered on April 7, 1994. This Court has jurisdiction to review the judgment of the Fifth Circuit under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below

Petitioner Clement Bernard (Bernard) filed this case on July 31, 1990, claiming the Respondent City of Dallas (City) had discriminated against him in violation of 42 U.S.C. §2000(e) *et seq.* (Title VII). Petitioner claimed he suffered racial discrimination because he was denied training in trying to achieve a promotion, he was retaliated for having filed an Equal Employment Opportunity Commission (EEOC) charge, and he claimed he was a victim of a hostile racial environment.

Respondent filed a Motion for Summary Judgment on April 2, 1993. On June 23, 1993, the district court granted the Respondent's motion on all issues. The district court specifically held that Bernard had failed to establish a *prima facie* case of disparate treatment with respect to promotions. As to the hostile work environment, the district court held that Bernard had failed to meet the hostile work environment standard set out in

Rogers v. EEOC.[1] The district court also ruled that Bernard had failed to show any adverse employment action to support his allegation of retaliation.[2]

Bernard filed a timely appeal, and on April 7, 1994, the Fifth Circuit issued its decision. Although the Fifth Circuit's analysis differed from the district court on the issue of hostile work environment, it affirmed the granting of summary judgment.[3] On the promotional issue, the appeals court agreed with the district court and held that Petitioner did not present sufficient evidence of any racial animus in his claim that he suffered discrimination in his attempts to be promoted to the rank of T-9 Instrument Technician. The circuit court held that Bernard did not pass the required promotional exam, and thus did not adduce sufficient evidence to create a genuine fact issue concerning this claim. This holding is consistent with this Court's previous decisions and the decisions of the other circuits.

On the issue of a hostile work environment, the Fifth Circuit held that while the circumstances imply that a hostile working environment may have existed, the evidence showed that management took prompt remedial action when informed that Bernard found any conduct offensive. The circuit court held that management's handling of the situation after Bernard complained never

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[1] 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 481 U.S. 957 (1972). *See, Clement Bernard v. City of Dallas*, No. 90-1783, Memorandum Opinion and Order (N.D. Tex. June 23, 1993).

[2] Petitioner has not appealed the issue of retaliation.

[3] *See Clement Bernard v. City of Dallas*, No. 93-1651 (5th Cir. April 7, 1994).

suggested that any of the alleged offensive conduct was tolerable or excusable, nor did management ever advise Bernard to ignore the behavior. The circuit court ruled that management's uncontroverted actions constituted a prompt remedial response to Bernard's complaint. This holding is consistent with this Court's previous decisions and the decisions of the other circuits.

B. Statement of Facts

On March 12, 1986, Bernard, an African-American male, began working as an Apprentice Water Instrument Technician T-7 at the Southside Wastewater Treatment Plant's Instrument Section (SSWWTP) for the Dallas Water Utilities (DWU). Harry B. Ketter (Ketter), a white male, was also an employee of DWU. Ketter was hired as a Water Instrumentation Technician T-9 on December 10, 1980 by DWU. In September 1987, Bernard was assigned to work with Ketter. At no time during Bernard's employment with DWU did Ketter have the authority to fire, promote or otherwise directly affect Bernard's employment. R. pp. 111, 212.

In October 1988, Bernard verbally complained of Ketter for the first time to Ted Kilpatrick, SSWWTP Manager. The verbal complaint involved ongoing disagreements Bernard had with Ketter, allegedly regarding race, politics and religion. Bernard alleged that Ketter had made derogatory statements concerning his race. Bernard further alleged Ketter had posted derogatory drawings and pictures at the SSWWTP on the walls of the Instrument Section work area. Ted Kilpatrick immediately directed Don Perez, SSWWTP Assistant Manager, to investigate

the incidents, and to monitor the employees of the Instrument Section for inappropriate activities. R. pp. 44, 213. Approximately one week later, Perez reported to Kilpatrick that he had counseled with Ketter and Bernard, and each party was committed to going forward and working harmoniously. R. pp. 44-45. As plant manager, Kilpatrick also had a long standing policy of maintaining the work place free of inappropriate literature. The investigation did find some pictures of a sexual and religious connotation and Kilpatrick ordered that they be removed immediately. R. pp. 116-118. On December 14, 1988, Kilpatrick met with Bernard to determine the status of his grievance. According to Bernard, the concerns expressed in the complaint were resolved. R. p. 126.

On or about December 22, 1988, Kilpatrick held a counseling session with Bernard, Ketter and Don Pierce, a white male, who then was the supervisor of both Bernard and Ketter. Kilpatrick again discussed his policy of maintaining the work place free of inappropriate literature and the responsibility of each employee to work cooperatively. All three pledged that they would work cooperatively in the work place. Also, on December 22, 1988, Kilpatrick conducted a separate counseling session with Pierce concerning his responsibilities in overseeing the Instrumentation Group. Kilpatrick directed Pierce to monitor the employees and document any misconduct. R. pp. 127-128, 214.

On December 28, 1988, Bernard again verbally complained with Kilpatrick. Bernard alleged that the incidents of harassment by Ketter were continuing. In response Kilpatrick directed that another investigation be conducted. On or about January 9, 1989, Kilpatrick

ordered that the Instrument Section be reorganized and that Bernard and Ketter be assigned to different areas of the plant and to not work together. Kilpatrick also ordered that Ketter not be left in charge as acting supervisor should the supervisor Pierce not be on duty. Within three months of Bernard's original complaint, Kilpatrick took decisive action by removing Ketter from any position with authority. Bernard did not appeal Kilpatrick's response to his complaint. R. pp. 121-125, 214.

Bernard alleged racial discrimination and/or intimidation on January 23, 1989 in his first EEOC complaint (#310-89-0858). The EEOC determination on these charges found that there was no evidence that Bernard was ever denied proper training because of his race. More specifically, no evidence existed that Bernard was denied training received by other employees. The EEOC determination also concluded that the City of Dallas took prompt remedial action once made aware of harassment by a fellow employee, and that no additional relief was necessary. R. pp. 85-87.

Dallas Water Utilities management had a longstanding policy of maintaining all work areas free of inappropriate literature. Each incident involving inappropriate literature was investigated promptly, and the responsible employee was disciplined accordingly. Ketter was disciplined each time he was found to have violated that policy. On or about December 9, 1988, Kilpatrick discovered several Playboy-type magazines in Ketter's desk area. Kilpatrick confiscated these magazines and verbally reprimanded Ketter for having inappropriate material in the work place. R. p. 216. When questioned about the magazines, Ketter acknowledged he had read the magazines, but denied ownership. Ketter

received written reprimands for possessing inappropriate literature in the workplace on March 21, 1989, and again on August 8, 1989. R. pp. 130, 216. After counseling sessions proved unsuccessful, Kilpatrick ordered the permanent transfer of Ketter from SSWWTP in September, 1989. R. pp. 131, 216.

Bernard took the Water Instrument Technician T-9 exam on four occasions. The first occasion was on May 1, 1987. (Prior to being assigned to work with Ketter.) Bernard failed the exam on all four occasions. R.p. 99. Bernard did take and pass the Mechanic Technician T-9 exam. Bernard received tutoring assistance to pass this exam from Jessie Beard, a white male supervisor. Bernard testified that he would not have passed this exam without the assistance of Beard. R. pp. 81-83.

On July 31, 1990, Bernard filed this lawsuit against Defendant City of Dallas alleging racial discrimination in training, racial harassment and retaliation under 42 U.S.C. §2000(e). R. pp. 3, 7.

SUMMARY OF THE ARGUMENT

The Fifth Circuit's decision in the present case does not warrant review by this Court because the appeals court decision correctly applies this Court's precedent and applicable law, and there is no conflict among the circuits. The Fifth Circuit applied the proper standard by finding that Respondent's actions constituted a prompt remedial response each and every time they were notified

of alleged offensive conduct. Within three months of Bernard's first complaint to management, Ketter was transferred to another part of the plant. Counseling sessions and disciplinary actions with Ketter proved unsuccessful that after the in-plant transfer, Ketter was transferred to another plant. Moreover, the Fifth Circuit ruled that Petitioner's summary judgment evidence *did not contest* the facts concerning the city's handling of Ketter's misbehavior.

The Fifth Circuit also applied the proper standard by finding that Petitioner did not establish a *prima facie* case of discrimination or disparate treatment with respect to promotions. Petitioner failed to produce sufficient evidence of a racial animus with respect to this claim. The appeals court held that Ketter, a co-worker, could not directly influence the decision as to who was trained or promoted. Furthermore, Bernard never passed the required civil service exam to be promoted, and he provided no evidence that his failure was the result of the City denying him training. Nor did Bernard show that other individuals of other races were provided training to pass the civil service exams.

ARGUMENTS SUPPORTING DENIAL OF THE WRIT

I. HOSTILE WORK ENVIRONMENT AND REMEDIAL MEASURES UNDER TITLE VII

A. STANDARD UNDER TITLE VII

How hostile must an atmosphere be, or how severe must the effect be on an employee, to be actionable under

Title VII? In *Meritor,* this Court stated that, to constitute actionable harassment, the conduct must be "sufficiently severe or pervasive to alter the condition's of the victim's employment and create an abusive working environment."[4] After *Meritor,* most courts undertook a dual inquiry: first, would the condition in question be offensive to a reasonable person, and second, what was the actual impact on the individual harassed? As to the latter point, the required effect on the individual was unclear until the court in *Harris*[5] decided the issue.

> "Title VII comes into play before the harassing conduct leads to a nervous breakdown . . . the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion or natural origin offends Title VII's broad rule of workplace equality."[6]

The Seventh Circuit developed a six step test to analyze harassment cases. These steps are that: (1) the employee belongs to a protected group; (2) the employee was subject to unwelcome harassment; (3) the harassment complained of was based on race; (4) the harassment complained of affected a term, condition or privilege of employment; *(5) the plaintiff must be able to prove that the employer knew or should have known of the harassment and failed to take prompt and remedial action;* and (6) the

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[4] *Meritor Sav. Bank v. Vinson,* 477 U.S. 57, 67 (1986).

[5] *Harris v. Forklift Sys.,* 114 S. Ct. 367, 126 L.Ed.2d 295 (1993).

[6] *Id.* at 114 S. Ct. 367, 372.

employee acted reasonably under the circumstances.[7] This Court confirmed the fact that "mere utterance of an epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to implicate Title VII. A plaintiff must show that the hostile environment altered the conditions of his/her employment."[8]

B. PROMPT AND REMEDIAL ACTION

Under what conditions will the employer be held responsible for a hostile work environment? It is clear that an employee must do more than merely avoid actively creating a racially, ethnically or sexually intimidating environment.[9] This Court offered some guidance on this issue in *Meritor*.[10] The Court stated that traditional EEOC principles shall be used for guidance. It quoted from the agency's brief in which the Commission suggested an examination of the following factors:

- whether an employer has a policy forbidding harassment;
- whether it has in place a system to respond to complaints of harassment;

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[7] *Daniels v. Essex Group, Inc.*, 740 F.Supp. 553 (N.D. Ind. 1990), *aff'd*, 927 F.2d 1264 (7th Cir. 1991). (Emphasis added). *See also Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

[8] *Harris*, 114 S.Ct. at 372.

[9] *See* 29 C.F.R. §§1604.11(c) and 1606.8(c).

[10] *See* N.2 *Supra*. Although this court was asked to rule on employer responsibility, it declined to do so, finding that the record was not well developed on this issue.

- whether the alleged victim availed himself of that system;
- whether the system was reasonably responsive to the complaints; and
- whether the employer had actual notice of the harassment.[11]

If an employer has actual or constructive notice of a racially hostile work environment and fails to take active and effective steps to remedy it, the employer may have violated Title VII. If the employer takes prompt and remedial action, however, he will be relieved of liability.[12]

The Petitioner argues that the Fifth Circuit's ruling in this case removes the employer's obligation to eliminate racial harassment until the victim complains about the harassment. Petitioner goes on to argue that the Fifth Circuit's view gives no duty to the employer to end known harassment. The Fifth Circuit made no such ruling. Petitioner's argument is wholly contrary to the conclusions of the appeals court, district court and the EEOC.

The Fifth Circuit found that a racially hostile work environment may have existed in this case because Ketter "engaged in racially insulting conduct and displayed

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[11] *Meritor*, 477 U.S. at 71, *quoting* Brief for the United States and the Equal Employment Opportunity Commission as *Amici Curiae* at 26.

[12] *Davis v. Monsanto Chem. Co.*, 858 F.2d 345 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989). The court found that the employer took quick and appropriate remedial measures in response to racially derogatory graffiti, therefore, the employer was not liable for tolerating racial harassment.

materials derogatory of blacks (and religion) in the workplace."[13] But, the court also found that the evidence clearly showed that the managers of the water plant took prompt remedial action when informed that Petitioner found Ketter's conduct offensive. Moreover, the appeal court stated that management's handling of the Ketter situation never suggested that Ketter's offensive conduct was tolerated or excusable. Petitioner's summary judgment evidence,[14] fails to contest the facts concerning the handling of Ketter's misbehavior. The City's uncontroverted actions constituted a prompt remedial response to Bernard's complaints.[15]

The district court also looked very closely at the reaction of the City to Bernard's complaints. It found that in retrospect, Ketter's supervisors should probably have taken decisive action against Ketter in a more expeditious manner, however, ***"they cannot be faulted for taking the course they followed."*** Ketter was afforded every opportunity to improve his behavior; when all the City's efforts failed, he was transferred away from Petitioner within three months of the first complaint, and transferred to

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[13] *Clement Bernard v. City of Dallas*, No. 93-1651, slip op. at 2 (5th Cir. April 7, 1994).

[14] Petitioner's Response to City's Summary Judgment Motion consisted primarily of four Affidavits, all of which discussed the transgressions of Harry Ketter. R. 222. Petitioner provided no evidence which suggests that the City's actions were not reasonable.

[15] *Clement Bernard v. City of Dallas*, No. 93-1651, slip op. at 3 (5th Cir. April 7, 1994).

another plant several months later.[16] The EEOC also investigated Petitioner's complaint and it also found that the City took prompt remedial action and that no additional relief was necessary.[17]

Petitioner's argument that the City, more specifically SSWWTP Management, was aware of the hostile work environment long before Bernard complained is baseless and without merit. Petitioner makes the following conclusory statements:

> "Although plant managers had earlier failed to act on misconduct known to all . . . "[18]

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[16] *Clement Bernard v. City of Dallas*, No. 90-1783, Memorandum Opinion and Order at 11 (N.D. Tex. June 23, 1993). (Emphasis added).

[17] EEOC's Determination Letter specifically stated: The evidence obtained during the investigation substantiates that the work environment was not free from sexual harassment, racially discriminatory literature and drawings, and intimidation. *This was reported to Respondent in October 1988, and Respondent took action to remedy the situation, i.e., the person creating the hostile environment was transferred to another work site.*
Section 706(b) of Title VII requires that if the Commission determines that there is reason to believe that violations have occurred, it shall endeavor to eliminate the alleged unlawful employment practices by informal methods of conference, conciliation, and persuasion. However, since the Respondent undertook remedial action, the Commission, accordingly, *deems that no additional relief is necessary, and the harassment and intimidation issue is hereby considered resolved.* R. p. 86 (Emphasis added).

[18] Petitioner's Petition for Writ of Certiorari, p. 9.

> "The undisputed evidence made clear that management had known about the harassment long before October 1988."[19]

Both these statements are not supported by the record that is before this court. No evidence has ever been presented that SSWWTP Management was ever aware of the actions of Ketter. The Fifth Circuit does state in its decision that Ketter's activity apparently went on for some time, but it never found that management had either actual or constructive knowledge of Ketter's actions. Moreover, Ketter and Bernard only worked together fourteen (14) months prior to Bernard filing his first complaint. No evidence exists that Bernard was a victim of any type of harassment during the early part of this relationship. In fact, the record shows that Petitioner and Ketter voluntarily engaged in acrimonious conversations with each other about various racial, religious and sexual issues. R. p. 221. The record does reflect, however, that once Kilpatrick was made aware of the problems caused mostly by Ketter, he promptly acted to eliminate the hostile environment.

The Fifth Circuit's decision applies the standard recognized by all the circuit courts, that an employer is responsible for acts of harassment in the workplace ***where the employer (or its agents) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.*** "Every circuit which has addressed this issue has agreed with this standard."[20]

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[19] *Id.*

[20] *Meritor State Bank v. Vinson*, 477 U.S. 57, 67 (Marshall, J., concurring).

Petitioner claims that the Fifth Circuit's decision in this case is expressly rejected by the Fourth and Sixth Circuits. A closer look at the cases cited by Petitioner as being similar to the present case reveals glaring differences. In *Yates*, two female employees filed sexual harassment allegations against their supervisor in the fall of 1983. Evidence was offered to indicate that the supervisor had harassed women as early as 1980, and the employer had notice of the supervisor's tendencies at this earlier date. Three other women had in one way or another, notified management of the supervisor's harassment since 1980.[21]

In *Paroline*, the Fourth Circuit reversed a decision granting motion for summary judgment in favor of the employer because evidence showed that there had been prior complaints to management by other employees about sexual harassment by the individual who victimized the plaintiff. Moreover, the employer only took nominal measures in response to the known harassment.[22]

Both of the cases cited are distinguishable from the present case. No evidence was ever presented by Petitioner that SSWWTP Management was aware of Ketter's actions before October 1988. No evidence was presented

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[21] *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987). The court specifically found that the evidence established that Avco knew, or should have known, that the supervisor was sexually harassing the plaintiffs and other females. Moreover, it found that it had a sexual harassment policy that did not function properly. *Id.* at 636.

[22] *Paroline v. Unisys Corp.*, 879 F.2d 100, 106 (4th Cir. 1989).

that they *should* have been aware of Ketter's actions. The only evidence on the record, before this Court is that immediately upon being notified of Ketter's actions, Kilpatrick, Manager of SSWWTP, took action. Initially, counseling sessions, then reprimands against Ketter, then transferring Ketter to a different work group, and then within ten (10) months of Petitioner's first complaint, Ketter's transfer to another location. It is because of these facts that the district court, appeals court, and this Court should find that the City took immediate and appropriate corrective action to eliminate the hostile work environment.

II. PETITIONER FAILS TO ESTABLISH A *PRIMA FACIE* CASE OF RACIAL DISCRIMINATION IN PROMOTIONS UNDER TITLE VII

A. STANDARD UNDER TITLE VII

Under the disparate treatment theory in a Title VII action, existence of a pattern or practice of discrimination must be proved, and such theory requires proof of discriminatory intent, which must be established by either direct or circumstantial evidence.[23] A plaintiff must show that the defendants intentionally treated him unfairly because of his race.[24]

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[23] 42 U.S.C. §2000(e), *et. seq.*

[24] *Valdez v. San Antonio Chamber of Commerce*, 974 F.2d 592, 596 (5th Cir. 1992), *Vaughn v. Edel*, 918 F.2d 517, 521 (5th Cir. 1990).

In a typical disparate treatment case, a plaintiff must prove a *prima facie* case of discrimination by showing that (1) he is a member of a protected group; (2) he was qualified for the job he held; (3) he was discharged; and (4) after his discharge, his employer filled the position with a person who is not a member of the protected group.[25] This case allegedly involves the denial of proper training needed for promotion.

Discrimination in access to training or retraining programs is illegal under a special provision of Title VII,[26] although the same result may well follow from Title VII's more general provisions requiring non-discrimination in all terms and conditions of employment. The issue of discrimination in training usually arises in promotion cases in which an employee contends that he or she was not offered training available to others, or was not given training as good as that given to others, and that discrimination was the reason for the lack of promotion.[27] To

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[25] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

[26] 42 U.S.C. §2000(e)-2(2) states: It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

[27] *Washington v. Electrical Joint Apprenticeship and Training Comm.*, 845 F.2d 710 (7th Cir. 1988), *cert. denied*, 488 U.S. 944 (1988).

show discrimination in training opportunities, the plaintiff must show either he was provided inadequate training because of discrimination, or that training opportunities were given out in a discriminatory manner.[28]

B. NO DENIAL OF TRAINING

Petitioner argues that the decision of the Fifth Circuit conflicts with decisions of other circuits because it allows an employer to deny black workers promotions by not providing the necessary training. Bernard asserts that the Fifth Circuit's decision circumvents Title VII protections based solely on an employee's geographical location. This is not the finding of the Fifth Circuit. Furthermore, there is ample evidence in the record that Bernard was not denied a promotion based upon his race.

Contrary to Petitioner's arguments, the record does not have any evidence, direct or indirect, of statements by Ketter or Petitioner's supervisor that they were determined to prevent any black worker from promoting into a T-9 position. Notably absent in Petitioner's brief are cites to the record of these preposterous findings. Petitioner also exaggerates that Ketter was responsible for providing the needed training in order to be promoted. The Fifth Circuit correctly found that Ketter, a co-worker, could not directly influence the promotional decision. The record does show that Bernard sought promotion from a T-7 Apprentice Instrument Technician to a T-9 Instrument Technician. The T-9 promotion was based

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[28] *Id.*

upon an objective Civil Service Exam. Bernard had knowledge of what was to be covered on the T-9 exam since he took and failed the exam on May 1, 1987, prior to being assigned to work with Ketter. Bernard also took and failed the exam on three other separate occasions. R. p. 99. No evidence exists that these failures occurred while Bernard and Ketter worked together. Moreover, no evidence exists to show that the exams had a disparate impact on minorities.

Petitioner did take and pass the Mechanic Technician T-9 test on November 3, 1988. R. p. 99 (during the time he worked with Ketter). Bernard states that he was tutored by Jessie Beard, Maintenance Supervisor, who is a white male, to prepare for that exam. The fact that Bernard passed this exam with the assistance of a white male demonstrates that the City did not practice racial discrimination in training. Furthermore, Petitioner stated he would not have passed that exam if it had not been for the help of Jessie Beard. R. pp. 81-83.

The evidence, or lack of evidence in this case, which is fatal to Petitioner's argument is the fact that it fails to show that any white employee received training which Petitioner was denied. No evidence exists that Ketter or any other supervisor was training non-minorities to pass

the Instrument Technician T-9 exam.[29] In fact, the only evidence of someone receiving special training was Petitioner in the help he received from Beard to pass the Mechanic Technician exam.

Petitioner fails to make out a *prima facie* case because he never was qualified for an Instrument Technician T-9, having failed the test every time he took it. Moreover, Petitioner provides no evidence to show that a similarly situated non-minority who failed the Instrument Technician T-9 exam was promoted to that position.

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[29] EEOC specifically found the lack of this evidence to be fatal. The EEOC's Determination Letter specifically stated: "The evidence shows that Charging Party received some training, but that training was not formalized. He was denied a two-year college program because of lack of funds. Others of different races were also denied this training. *There is no evidence to support that CP [Bernard] was denied training because of his race, Black.*" R. p. 85. (Emphasis added).

CONCLUSION

None of the issues Bernard presents is of precedential value that warrants review by this Court. Additionally, there is no conflict among the circuits regarding any of the issues presented. The Fifth Circuit meticulously reviewed the facts and applied the correct legal standards in reaching its conclusions. For these reasons stated herein, this Court should deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CLEMENT BERNARD,

Petitioner,

v.

CITY OF DALLAS WATER DEPARTMENT, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S RESPONSE TO BRIEF IN OPPOSITION

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ARGUMENT

Respondent, rather than defending the actual reasoning of the Fifth Circuit, urges that alternative grounds may exist for affirming the decision below. The fact-based alternative grounds advanced by respondent are clearly insubstantial.

Respondent now urges that summary judgment was appropriate on petitioner's harassment claim because "[n]o evidence has ever been presented that . . . management was ever aware" of the harassment prior to petitioner's October

1988 complaint. (R. Br. Opp. 14). In fact, as is quoted at length in the petition, there was extensive evidence both that management knew of the systemic harassment long before October 1988 and that management refused to take any steps to end it. (Pet. 4-5). The affidavits proffered by petitioner on this issue were never disputed in the courts below.

With regard to petitioner's claim of racial discrimination in training, respondent now asserts "the record does not contain any evidence direct or indirect, of statements by Ketter or Petitioner's supervisor that they were determined to prevent any black worker from promoting into a T-9 position". (R. Br. Opp. 18). In fact, an affidavit recounting precisely such statements is in the record, and is quoted at p.6 of the Petition. Respondent asserts that "Ketter . . . could not directly influence the decision as to who was trained". (R. Br. Opp. 8). The only evidence on this issue, however, is an uncontradicted affidavit to the contrary that Ketter himself was actually responsible for the training. (Pet. 6).

Respondent candidly disavows the actual reasoning of the Fifth Circuit. The court of appeals insisted that the relevant legal issue was whether the employer had acted promptly "after *Bernard* complained". (Pet. App. 25a) (Emphasis added). In this Court, however, respondent now acknowledges that it was legally obligated to act once it had from any source "actual or constructive notice of a racially hostile work environment." (R. Br. Opp. 11).

Similarly, respondent acknowledges that the gravamen of petition's promotion claim is an allegation of discriminatory "denial of proper training needed for promotion", (R. Br. Opp. 17). In this Court respondent now concedes that Title VII would be violated if a worker were denied a promotion due to discrimination in training:

> Discrimination in access to training . . . is illegal under . . . Title VII . . .. The issue of discrimination in training usually arises in promotion cases in which an employee contends that he or she was not offered training available to others . . . and that . . . was the reason for the lack of promotion.

(R. Br. Opp. 17). The Fifth Circuit below, however, held otherwise, insisting that Ketter's discriminatory refusal to train petitioner was legally irrelevant so long as Ketter himself did not make the subsequent promotion decision. (Pet. App. 23a).

Had the Fifth Circuit below applied the legal standards now endorsed by respondent, petitioner would have prevailed in the court of appeals. Since respondent no longer defends the legal standard on which the Fifth Circuit's opinion was based, the appropriate disposition here may be to grant the petition, vacate the decision below, and remand for reconsideration in light of the position presently asserted by the respondent City of Dallas in its brief filed August 9, 1994. See, e.g., *Wells v. United States*, 62 U.S.L.W. 3704 (April 26, 1994); *Green v. United States*, 62 U.S.L.W. 3471 (January 18, 1994); *Woodward v. United States*, 62 U.S.L.W. 3318 (November 2, 1993); *Knox v. United States*, 62

U.S.L.W. 3318 (November 2, 1993); *McGinley v. United States*, 62 U.S.L.W. 3243 (October 5, 1993).

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